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No. 07-1190

In the Supreme Court of the United States

WALTER BROWNE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
ALICE S. FISHER
Assistant Attorney General
STEPHAN E. OESTREICHER, JR.
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether a conviction under 29 U.S.C. 186(b)(1), which prohibits a union official from accepting payment from an employer whose employees were of the type that the union "would admit to membership," requires proof that the employer currently employed union members.

2. Whether a jury verdict finding a violation of the RICO statute, 18 U.S.C. 1962(c), should be upheld when the jury found at least two predicate racketeering acts that sufficiently establish the continuity requirement of a "pattern" of racketeering activity, but the jury also found other predicate acts that the reviewing court assumes were not sufficiently supported.

3. Whether any error in the jury instructions under 29 U.S.C. 186 in failing to state that the category of "employees" does not include "supervisors" was harmless beyond a reasonable doubt because overwhelming evidence established that the relevant employer had qualifying employees that the union would represent.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-98a) is reported at 505 F.3d 1229.

JURISDICTION

The judgment of the court of appeals was entered on October 25, 2007. A petition for rehearing was denied on December 19, 2007 (Pet. App. 99a-100a). The petition for a writ of certiorari was filed on March 17, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of conspiring to participate in the conduct of an enterprise through a pattern of racketeering activ-

ity, in violation of 18 U.S.C. 1962(d); participating in the conduct of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c); accepting an unlawful payment from an employer while serving as an official of a labor organization, in violation of 29 U.S.C. 186(b)(1) and (d)(2); mail fraud, in violation of 18 U.S.C. 1341 and 2; and failing to maintain labor-organization records, in violation of 29 U.S.C. 439(a) and 18 U.S.C. 2. He was sentenced to 70 months of imprisonment, to be followed by three years of supervised release, and was ordered to forfeit his racketeering proceeds. The court of appeals affirmed. Pet. App. 1a-98a.

1. Petitioner served as a high-level official in two labor unions. Starting in 1977, he was the executive director of District 1-Marine Engineers Beneficial Association (D1-MEBA), an AFL-CIO chartered labor organization. In late 1993, D1-MEBA created an affiliate union, the National Federation of Public and Private Employees (NFOPAPE), and petitioner became its president, while continuing to serve as executive director of D1-MEBA during a transition period. Both unions represented licensed and unlicensed seamen; maritime engineers; land-based support workers handling freight and staffing offices for shipping companies; and various public-sector employees such as bus drivers and custodial workers. Pet. App. 3a-4a, 6a-7a; Gov't C.A. Br. 3-5.

Petitioner's high-level positions within the unions enabled him to make hiring decisions and to incur entertainment and travel expenses for union-related business. Using this authority, petitioner hired his sister, co-defendant Patricia Devaney, as an administrative assistant and gave her full authority over union finances, subject to little or no oversight. Petitioner and Devaney then exercised their collective control over the unions to di-

vert union assets for personal use. For example, petitioner submitted vouchers for reimbursement of personal travel, entertainment, and telephone calls; used union offices during business hours as a forum for high-stakes poker games with personal friends, business leaders, and politicians; and tasked union employees to run his personal errands during business hours. In addition, Devaney routinely submitted vouchers for personal expenses and authorized payment of false bonus checks to herself, her husband, and her daughter. Petitioner concealed these expenditures by refusing other officials' requests to audit union records and by deflecting the officials' complaints about Devaney's handling of the finances. Pet. App. 4a-5a, 7a-11a; Gov't C.A. Br. 6-8, 14-19.

Between 1993 and 1998, while serving at the unions and deriving his income from membership dues, petitioner also accepted payments from employers in the maritime and shipping industries, in return for his "consulting" and "lobbying" efforts on the employers' behalf. For instance, petitioner accepted approximately $250,000 from Hvide Marine, a company that provided tug-boat services, support for offshore drilling, and transportation for petroleum and other chemicals. Hvide was founded by one of petitioner's close friends, and it employed thousands of seamen, other maritime workers, and land-based support employees. The $250,000 that petitioner accepted from Hvide was payment for petitioner's efforts to obtain union support for a proposed labor agreement between Hvide and D1-MEBA. Despite petitioner's efforts, D1-MEBA eventually rejected the proposal because, as one union official put it, it would have been "far and away * * * the

worst contract" that D1-MEBA had. Pet. App. 31a-34a; Gov't C.A. Br. 8-13.

2. A federal grand jury in the Southern District of Florida returned a second superseding indictment charging petitioner with, *inter alia*, conspiring to participate in the conduct of an enterprise through a pattern of racketeering activity, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(d) (Count 1); participating in the conduct of an enterprise through a pattern of racketeering activity, in violation of RICO, 18 U.S.C. 1962(c) (Count 2); accepting payment from Hvide, an employer whose employees were ones whom petitioner's unions "represent[ed], s[ought] to represent, or would admit to membership," in violation of the Labor Management Relations Act (Taft-Hartley Act), 29 U.S.C. 186(b)(1) and (d)(2) (Count 3); mail fraud, in violation of 18 U.S.C. 2 and 1341 (Counts 7, 12, 13, and 14); and failing to maintain labor-organization records, in violation of 18 U.S.C. 2 and 29 U.S.C. 439(a) (Count 19). Pet. App. 11a-13a, 52a; Gov't C.A. Br. 1-2; 01-6258-CR Docket Entry No. 210, at 1-47 (S.D. Fla. May 8, 2003) (Dkt.).

Count 2, the substantive RICO count, charged several predicate racketeering acts that formed a pattern under 18 U.S.C. 1961(1) and (5). As relevant here, the predicate acts included accepting the $250,000 payment from Hvide, in violation of the Taft-Hartley Act (Predicate Act 1); accepting similar payments from two other maritime-industry employers, Coastal Gaming Group and Coleary Transport Company, also in violation of the Taft-Hartley Act (Predicate Acts 2 and 4); and submitting expense vouchers for reimbursement of meals and airline tickets unrelated to union business, in violation of

the mail fraud statute (Predicate Acts 13 and 14). Pet. App. 18a-19a, 52a; Dkt. 210, at 12-36 (May 8, 2003).

Petitioner pleaded not guilty and the case proceeded to trial. As part of a proposed jury instruction defining the elements of a Taft-Hartley offense under 29 U.S.C. 186, petitioner suggested that the court instruct the jury: "Supervisory personnel are not employees for purposes of the Taft-Hartley Act." Dkt. 298, at 24 (May 26, 2004). The district court declined to give that part of the instruction. Dkt. 353, at 23 (June 3, 2004).

After a two-month trial, the jury found petitioner guilty on Counts 1, 2, 3, 7, 12, 13, 14, and 19, and acquitted him of the remaining charges. In a special verdict form, the jury indicated that, in finding petitioner guilty on Count 2, it had unanimously found that petitioner committed Predicate Acts 1, 2, 4, 13, and 14. Pet. App. 13a-14a; Dkt. 346, at 1-8 (June 2, 2004).

Petitioner moved for a judgment of acquittal based on evidentiary sufficiency. Dkt. 367, at 1, 3-9 (July 7, 2004). He also sought a new trial, on the ground that the district court erred in denying his motion to sever his trial from Devaney's trial. *Id.* at 9-10. The district court denied those motions. Dkt. 407, at 1-16 (Dec. 15, 2004).

The district court sentenced petitioner to concurrent prison terms of 70 months each on Counts 1, 2, and 7; 60 months each on Count 3, 12, 13, and 14; and 12 months on Count 19. The court also imposed a three-year term of supervised release, and ordered petitioner (jointly and severally with Delaney) to forfeit $592,271.32. Pet. App. 14a; Dkt. 409, at 2 (Dec. 28, 2004); Dkt. 422, at 3-4 (Feb. 24, 2005).

3. The court of appeals affirmed. Pet. App. 1a-98a.

a. The court of appeals first rejected petitioner's challenge to his conviction on Count 3, the Taft-Hartley

Act violation. Pet. App. 20a-37a. Petitioner contended that the evidence was insufficient to show that he accepted a payment from an employer whose employees his unions "would admit to membership," 29 U.S.C. 186(a)(2), because Hvide's existing maritime employees were not currently members of D1-MEBA or NFOPAPE. Pet. App. 20a-22a; Pet. C.A. Br. 37.

The court of appeals observed that Section 186 forbids payment from an employer to a labor official whose union "represents, seeks to represent, or *would admit to membership*, any of the *employees* of such employer who are employed in an industry affecting commerce." Pet. App. 18a (quoting 29 U.S.C. 186(a)(2)). Reading this language "as a whole," the court determined that "there can be no criminal liability under § 186[ ] * * * unless, at the time the payment was made or agreed upon, the employer currently had employees who would be admitted to membership in the union." *Id.* at 23a. As the court explained, "[t]he use of the present tense ('are employed') imposes a temporal limitation on the employment status of those employees whom § 186 would protect from corrupt double-dealing between union officials and employers." *Ibid.* The court also held, however, that although Section 186 "requires an existing employment relationship * * * that association need not be with *current* * * * members" of petitioner's unions; instead, the employees need only be "the type of workers" who "would be admitted to membership" of petitioner's unions. *Id.* at 24a, 33a. Interpreting Section 186 as petitioner suggested, the court observed, would "render * * * superfluous" the "would admit to membership" clause, because another clause of Section 186 independently prohibits payment to an official whose

union *already* "represents" the employer's current employees. *Id.* at 29a.

Applying that test, the court determined that there was sufficient evidence to support petitioner's Taft-Hartley Act conviction. Pet. App. 29a-37a. Based on the evidence, it held that "a reasonable jury could conclude that D1-MEBA and NFOPAPE would have admitted to membership the * * * seamen * * * and land-based support staff" who were already "in Hvide's employ" at the time Hvide payed petitioner $250,000. *Id.* at 32a. As the court explained, "the life blood of [petitioner's] unions was recruitment," and Hvide's employees were "precisely the type of workers that were already organized" in petitioner's unions. *Id.* at 32a-34a.

b. The court of appeals then rejected petitioner's challenges to Counts 1 and 2, the RICO conspiracy count and the substantive RICO count. Pet. App. 37a-57a.

With respect to the substantive RICO count, petitioner argued that a new trial was warranted because two of the predicate acts found by the jury were invalid (Predicate Acts 2 and 4, the alleged Taft-Hartley violations involving Coastal Gaming and Coleary Transport), and it is unclear whether the jury would have found a pattern of racketeering without them. Pet. App. 38a-41a. The court rejected that claim, because, even assuming petitioner's challenges to Predicate Acts 2 and 4 had merit, *id.* at 39a, the remaining predicate acts were sufficient to demonstrate a pattern of racketeering, *id.* at 38a-53a. The court noted that it had already rejected petitioner's challenge to Predicate Act 1 (the Taft-Hartley violation involving Hvide) and that petitioner did not take issue with Predicate Acts 13 and 14 (mail-fraud violations involving reimbursement of meals and travel unrelated to union business). *Id.* at 39a. Ac-

cordingly, the only question remaining was whether the evidence sufficed to show that those predicate acts formed "a pattern of racketeering activity" under RICO. *Id.* at 40a.

Citing this Court's decision in *H.J. Inc.* v. *Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989), the court of appeals recognized that, to establish a pattern of racketeering activity, the government was required to prove "not only that at least two predicate acts were committed," but also that [1] "the * * * predicates [were] related," and [2] "they amount[ed] to or pose[d] a threat of continued criminal activity." Pet. 40a (quoting *H.J. Inc.*, 492 U.S. at 239). Because petitioner limited his challenge to the "continuity" requirement, the court addressed that issue alone, *id.* at 40a-41a, and had "no trouble" finding that the evidence was sufficient to satisfy it, *id.* at 51a. Reviewing the series of payments that petitioner accepted from Hvide from 1993 through 1998 (Predicate Act 1) and the series of expense vouchers for personal expenditures that he submitted or caused to be submitted on more than a dozen occasions over the course of six years (Predicate Acts 13 and 14), *id.* at 51a-52a, the court found the continuity component of the pattern requirement satisfied. That "series of related [acts] extending over a substantial period of time" suggested that the violations were part of petitioner's "regular way of doing business." *Id.* at 52a-53a (internal quotation marks omitted).

Petitioner argued that, rather than review the sufficiency of the evidence, the court should reverse and remand for a new trial, because Predicate Acts 2 and 4 "were similarly critical to the government's case," and the court should not "hazard a guess" about whether the jury would have found a pattern of racketeering activity

without them. Pet. C.A. Br. 39-44. Because petitioner never sought a new trial on that ground before the district court, the court of appeals "deem[ed] such an argument waived." Pet. App. 16a n.13. The court nonetheless considered and rejected petitioner's argument, explaining that because the jury made no specific finding on the "continuity" issue, its decision on that issue is "much like a general verdict," *id.* at 47a, which is "'valid so long as it was legally supportable on one of the submitted grounds.'". *Id.* at 47a-48a (quoting *Griffin* v. *United States*, 502 U.S. 46, 49, 59-60 (1991)). Because the court determined that a rational jury could find that two or all three of the remaining predicate acts satisfied the "continuity" component of the pattern-of-racketeering-activity requirement, which was the only aspect petitioner challenged, a new trial was not warranted. *Id.* at 45a-51a, 57a.

Turning to the RICO conspiracy count, the court held that the evidence was sufficient to support the jury's verdict, "even assuming that Predicate Acts 2 and 4 fail." Pet. App. 53a-57a. The court concluded that the government presented sufficient evidence to show that petitioner and Devaney agreed to the "overall objective" of "control[ling] the financial affairs of the union[s] and misus[ing] [their] assets and influence for personal gain," *id.* at 55a, noting the evidence that petitioner placed Devaney in charge of the unions' finances, *id.* at 55a; directed her to submit false expense vouchers, *ibid.*; concealed her improper handling of the finances, *id.* at 56a-57a; helped her "deflect[]" other officials' requests to audit union books and records, *id.* at 57a; and failed to

take corrective action when learning of her payroll theft, *ibid.*[1]

c. Finally, the court of appeals rejected petitioner's claim that the district court's failure to give a requested jury instruction further defining "employees" for purposes of the Taft-Hartley Act offenses constituted reversible error. Pet. App. 60a-64a. As a threshold matter, the court disagreed with petitioner's characterization of his proposed instruction as a "theory-of-defense instruction," stating that petitioner "did not propose a proper theory-of-defense instruction, but instead proposed an addition to the court's instruction on the elements that would have excluded supervisors from the definition of 'employees,'" which is "more akin to a failure by the district court to instruct on one element of an offense than a failure to explain a specific defense theory." *Id.* at 61a n.29.

In any event, the court determined, even if petitioner were correct that the district court should have instructed the jury that supervisors are excluded from "employees," any error was harmless. Pet. App. 62a-63a. The court observed that "[a] district court's failure to instruct a jury on all of the statutory elements of an offense is subject to harmless-error analysis." *Id.* at 63a (citing *Mitchell* v. *Esparza*, 540 U.S. 12, 16 (2003) (per curiam), and *Neder* v. *United States*, 527 U.S. 1, 9 (1999)). It then concluded that any omission here was harmless beyond a reasonable doubt as to Count 3 because the government presented "overwhelming evi-

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[1] The court also rejected petitioner's challenge on the mail fraud count, Count 7, explaining that although mail fraud "is distinct from a violation of the Taft-Hartley Act," petitioner raised "no specific challenges to his conviction," and "there was sufficient evidence at trial to establish the elements of the crime." Pet. App. 57a-60a.

dence" that not all the relevant seamen were "supervisors" for collective-bargaining purposes; petitioner's unions represented non-supervisory seamen; and Hvide employed seamen "that were of the precise type of workers that were already organized by" petitioner's unions. *Id.* at 63a-64a. In the court's view, even with petitioner's proposed "supervisor" instruction, "the jury would have reached the same conclusion." *Id.* at 64a.[2]

ARGUMENT

1. Petitioner first contends (Pet. 16-20) that the court of appeals erred in upholding his conviction on Count 3 because 29 U.S.C. 186 requires proof of an "*existing* employment relationship" not only between Hvide and its workers but *also* between those workers and petitioner's unions. That contention lacks merit and does not warrant further review.

a. Section 186(b), the provision under which petitioner was charged in Count 3, makes it "unlawful for any person to * * * accept * * * any payment * * * prohibited by" Section 186(a). 29 U.S.C. 186(b)(1). As relevant here, Section 186(a) makes it "unlawful for any employer * * * to pay * * * any money * * * to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce." 29 U.S.C. 186(a)(2).

As the court of appeals correctly held (Pet. App. 22a-23a), this statutory language requires proof of an exist-

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[2] Petitioner also argued that the district court erred in refusing to sever his case from Devaney's. The court of appeals rejected that contention, Pet. App. 64a-71a, and petitioner does not renew it before this Court.

ing relationship between the employer (here, Hvide) and its own employees (here, Hvide's seamen and other workers) at the time of the allegedly unlawful payment to a union official.[3] But contrary to petitioner's argument, that does not mean that those employees also must have been *members of the official's union* when their employer paid the union official. Pet. App. 22a-29a. The statute's plain language requires only that the employee have employees that the union "would admit to membership." 29 U.S.C. 186(a)(2); see Pet. App. 24a. Petitioner's reading of the statute would render meaningless the "would admit to membership" clause, because, as the court of appeals recognized (Pet. App. 29a), a separate clause of Section 186 independently prohibits

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[3] Petitioner actually suggested otherwise in the district court. One of his proposed jury instructions read: "'[W]ould admit to membership' * * * means that at the time [the alleged payment was made], there was either a present intention for the employees of the employer to apply for membership [in petitioner's union] or that there was a present *intention* for the employer * * * *to employ employees* that would or could be admitted into membership." Dkt. 298, at 25 (Mar. 26, 2004) (emphases added). The district court approved this instruction and read it, all but verbatim, to the jury. Dkt. 353, at 25 (June 3, 2004). When rejecting petitioner's sufficiency challenge to Count 3, the court of appeals noted (Pet. App. 21a-22a n.14) that petitioner was not challenging the district court's instruction, likely because he himself had proposed it.

Neither the court of appeals nor the government suggested that, by proposing an instruction that did not require the government to prove an existing employment relationship between either (1) Hvide and its own workers, or (2) Hvide's workers and petitioner's unions, petitioner had waived the right to advocate such a requirement on appeal. Because further review is unwarranted in any event, this Court need not decide whether petitioner should be estopped from raising a claim now that directly contradicts the position he took in the district court.

paying an official whose union already "represents" the employer's current employees. 29 U.S.C. 186(a)(2).

The statute's legislative history confirms this construction. As the Third Circuit observed in *United States* v. *Pecora*, 798 F.2d 614 (1986), cert. denied, 479 U.S. 1064 (1987), the Taft-Hartley Act added the phrase "would admit to membership" because the previous version of Section 186 "proscribed only payments to [employees' current union] representatives." *Id.* at 622. The legislation was a direct response to perceived "loopholes * * * which both employer representatives and union officials turned to advantage at the expense of employees." *Ibid.* (quoting S. Rep. No. 187, 86th Cong., 1st Sess. 13 (1959)). One of the specific "loopholes" the legislation sought to correct was the situation in which a union was not already "a 'representative' of any of the employer's employees" and the employer paid off a union official in an effort to "induce . . . [the union] not to organize or represent the employees" in the first place. *Ibid.* (internal quotation marks omitted).

The Third Circuit in *Pecora*, like the court of appeals here, was presented with just the situation Congress contemplated—the employer's existing employees were not already represented by the union of which the defendant was an official when the defendant received payments from the employer. 798 F.2d at 619. And, like the court of appeals here, the *Pecora* court affirmed the defendant's conviction based on the "would admit to membership" clause, which would be "superfluous" if the statute were construed to require an existing relationship between the employer's employees and the defendant's union. *Id.* at 622. The court of appeals thus correctly rejected petitioner's contention that Hvide em-

ployees were required to have an existing relationship with his unions under 29 U.S.C. 186(a)(2).

b. Petitioner is mistaken in contending (Pet. 16-19) that the decision below conflicts with *United States* v. *Cody*, 722 F.2d 1052 (2d Cir. 1983), cert. denied, 467 U.S. 1226 (1984). The defendant in *Cody*, an official of a union whose members included truck drivers and similar workers, accepted the rent-free use of an apartment from a construction company. *Id.* at 1056-1057. Because the construction company did not employ any members of the defendant's union, he argued that the evidence was insufficient to support a conviction under 29 U.S.C. 186(a)(2). *Id.* at 1056-1057.

In addressing that sufficiency challenge, the *Cody* court emphasized that Section 186 prohibits a union official from accepting payment from an employer where the union would admit to membership "any of the *employees of such employer*." 722 F.2d at 1058 (quoting 29 U.S.C. 186(a)(2)). Based on this language, as well as the legislative history discussed above, the court reasoned that the statute was intended "to deal with employers' attempts through bribery of union officials to block unionization of [employers'] *present* employees." *Ibid.* "In other words," the court observed, "the statute was designed to protect possible *future unionization* of present employees, not, as here, the possible *future hiring* of present union members." *Id.* at 1059 (emphases added). The court thus rejected the government's argument that liability should attach because the construction company "would have employed * * * members [of the defendant's union] in the future," and it concluded that the government's evidence was insufficient because it showed only that the payment related to "future hiring," not "future unionization." *Id.* at 1058-1059.

The decision below is consistent with *Cody*. Like the Second Circuit in *Cody*, the court of appeals here recognized that "there can be no criminal liability under § 186[] * * * unless, at the time the payment was made or agreed upon, the employer *currently had employees* who would be admitted to membership in the union." Pet. App. 23a (emphasis added). Unlike in *Cody*, however, the government's evidence here met that requirement. The evidence showed that, at the time Hvide paid petitioner, the company already had "in [its] employ" "seamen * * * and land-based support staff" who "were the very types of employees that [petitioner's unions] would have admitted to membership." *Id.* at 32a, 34a. In other words, the payment here did not implicate "possible future hiring of present union members." *Cody*, 722 F.2d at 1059. Rather, the payment threatened "the possible future unionization of [Hvide's] present employees." *Ibid.* As *Cody* recognized, that was precisely the threat that the Taft-Hartley Act was meant to combat. *Ibid.*; see *Pecora*, 798 F.2d at 622. In sum, given *Cody's* reasoning, there is no reason to believe that the Second Circuit would have reached a different conclusion than the court below did on the facts of this case.

To the extent that there is any tension between the Second Circuit's analytical approach on the one hand and the Third and Eleventh Circuits' approach on the other, review is not warranted at this time. Petitioner cites no case in which the Second Circuit or any other court has reversed a conviction where "possible future unionization" of present employees—as opposed to "possible future hiring of present union members"—was at issue. *Cody*, 722 F.2d at 1059. Indeed, petitioner himself points out (Pet. 18) that, "[b]efore the Eleventh

Circuit's decision in this case," there were "only two other decisions" that had squarely addressed the "would admit to membership" clause. The infrequency with which the issue has arisen confirms that any slight differences in the circuits' approaches do not warrant this Court's immediate review.

2. Petitioner also contends (Pet. 20-24) that Predicate Acts 2 and 4 "should never have been submitted to the jury," and as a result, the court of appeals should have reversed and remanded for a new trial on the substantive RICO count (Count 2), rather than conclude that there was sufficient evidence to uphold petitioner's RICO conviction using Predicate Acts 1, 13, and 14. He asserts (Pet. 21-23) that the decision below conflicts with the Second Circuit's decisions in *United States* v. *Delano*, 55 F.3d 720 (1995), and *United States* v. *Biaggi*, 909 F.2d 662 (1990), cert. denied, 499 U.S. 904 (1991).[4]

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[4] Petitioner challenged both the substantive RICO count (Count 2) and the RICO conspiracy count (Count 1) on this basis before the court of appeals. The court of appeals upheld Count 1 not based on any "agreement to commit personally two predicate acts," but instead because petitioner "agreed to the overall objective of the enterprise * * * to control the financial affairs of the union[s] and misuse [their] assets and influence for personal gain." Pet. App. 55a. Petitioner does not take issue with that holding, and he does not appear to raise any challenge to Count 1 in his petition. In any event, any such challenge would lack merit, because the court of appeals did not rely on the predicate acts found by the jury to uphold Count 1.

Petitioner also challenged Count 7 on this basis before the court of appeals, and he appears to renew that contention before this Court. Pet. 24 n.12. The court of appeals rejected petitioner's challenge to Count 7, explaining that mail fraud does not require proof of the Taft-Hartley violations alleged in Predicate Acts 2 and 4. Pet. App. 57a-64a. Petitioner does not take issue with that analysis in his petition, instead simply asserting that the "same analysis" applies to Count 2 and Count 7. Pet. 24 n.12. Petitioner makes no argument in support of that

The court of appeals' decision is correct, and there is no circuit conflict that warrants this Court's review.

a. In *H.J. Inc.* v. *Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989), this Court held that, to form a pattern of racketeering activity under RICO, the predicate acts at issue must be "related" and must "amount to or pose a threat of continued criminal activity." *Id.* at 239. Petitioner contends (Pet. 20-24) that Predicate Acts 2 and 4 are invalid and the court of appeals was consequently required to remand for a new trial rather than consider whether the evidence was sufficient to establish a pattern of racketeering on the basis of the remaining predicate acts (Predicate Acts 1, 13, and 14).

Petitioner's claim should be reviewed for plain error. As the court of appeals observed (Pet. App. 16a n.13), petitioner never "moved [in] the district court for a new trial" as to Count 2 "on the ground of the insufficiency of the predicate acts." It therefore "deem[ed] such an argument waived." *Ibid.* (The court nonetheless considered the claim and found that the district court did not err. *Id.* at 37a-51a.) Petitioner does not dispute that he failed to timely raise the claim. Thus, petitioner would not be entitled to relief under Federal Rule of Criminal Procedure 52(b) unless he could establish reversible plain error, which is to say, error that is plain or obvious, affects substantial rights, and seriously affects the fairness, integrity, or public reputation of judicial proceedings. *United States* v. *Cotton*, 535 U.S. 625, 631-632 (2002).

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assertion, and it does not warrant review. In any event, as the court of appeals explained, petitioner is mistaken in suggesting that the validity of Predicate Acts 2 and 4 affects his conviction on Count 7. See Pet. App. 57a-60a.

Petitioner cannot establish reversible plain error. First, there is no error, because there was no basis for the court of appeals to assume that Predicate Acts 2 and 4 were invalid and consider whether a new trial was warranted in the first place. Petitioner did not argue that there was insufficient evidence to support Predicate Acts 2 and 4; his challenge to Predicate Acts 2 and 4 was that the district court erred in interpreting the "would admit to membership" clause in 29 U.S.C. 186(a)(2). Pet. C.A. Br. 36, 38-39. The court of appeals expressly rejected that argument. Pet. App. 22a-23a. The court of appeals apparently believed that petitioner raised a separate sufficiency-of-the-evidence challenge to Predicate Acts 2 and 4, *id.* at 37a, but he did not.[5] Because there was no basis for assuming the invalidity of Predicate Acts 2 and 4, petitioner cannot establish error, even on his own theory about what a court should do when confronted with some invalid and some valid predicate acts. He surely cannot establish obvious error that "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Cotton*, 535 U.S. at 631-632 (internal quotation marks omitted).

Second, the court of appeals correctly upheld petitioner's conviction, rather than remand for a new trial, on the basis of this Court's decision in *Griffin* v. *United States*, 502 U.S. 46 (1991). In *Griffin*, this Court held that when the jury was instructed that it could find the defendant guilty of conspiracy if she had participated in either of the two objects of the conspiracy, and the jury returned a general verdict of guilty, the verdict must stand so long as one of the objects of the conspiracy was

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[5] Even if petitioner had made such an argument, a rational jury could have concluded, based on the evidence at trial, that petitioner committed Predicate Acts 2 and 4. See Gov't C.A. Br. 48-49.

supported by sufficient evidence. *Id.* at 47-48. The Court found no precedent to support the claim that a general verdict must be set aside where "one of the possible bases of conviction was neither unconstitutional * * * nor even illegal * * * but merely unsupported by sufficient evidence." *Id.* at 56. And the Court explained that it was reasonable to distinguish between a jury instruction that misstates the law and one that presents a theory of conviction that is not supported by the evidence, because although "[j]urors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law," they are "well equipped to analyze the evidence." *Id.* at 59-60.

The court of appeals correctly applied the logic of *Griffin* to this case. The court of appeals noted that, although the jury returned a special verdict finding multiple predicate acts, the jury did not specify which predicate acts it considered in concluding that petitioner engaged in a pattern of racketeering. Pet. App. 47a ("The jury's decisions on individual predicate acts indicate nothing about its finding of continuity. In this regard, the jury's finding of continuity is, with regard to that limited issue, much like a general verdict."). If Predicate Acts 2 and 4 were not supported by sufficient evidence, it would not mean that the remaining predicate acts were insufficient to establish the "continuity" component of the pattern element. The question under *Griffin* is whether a rational jury could have found that the remaining predicate acts did form a pattern of racketeering activity. *Id.* at 47a-49a. The court below properly undertook that inquiry and correctly concluded that the evidence on Predicate Acts 1, 13, and 14 supported the jury's finding of a pattern of racketeering. *Id.* at

51a-53a (Predicate Acts 1, 13, and 14 "constitute[d] a series of related predicates extending over a substantial period of time" and "were part of the defendants' regular way of doing business" (internal quotation marks omitted)).

It is true that this case differs from *Griffin* in that the jury actually found that petitioner committed Predicate Acts 2 and 4, which the court of appeals assumed was an erroneous finding. But it is nonetheless appropriate to apply *Griffin* to this case, because the jury did not return a special verdict indicating which predicate acts it determined formed a pattern of racketeering, and due process concerns are met if *any* rational jury could have found guilt beyond a reasonable doubt based on the evidence adduced. See *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979). As the court of appeals recognized, a contrary approach "would require unwarranted speculation into the jury's decisionmaking." Pet. App. 50a. Although *Griffin* presumes that jurors are well-equipped to identify a "factually inadequate theory," 502 U.S. at 59, and the court of appeals here assumed that the jury erroneously found sufficient evidence to support Predicate Acts 2 and 4, any error by the jury on those predicate acts does not render the guilty verdict infirm so long as there is sufficient evidence to support the jury's finding using only the valid predicate acts. See *United States* v. *Powell*, 469 U.S. 57, 66-69 (1984) (rejecting argument that guilty verdict must be vacated when verdicts were inconsistent but evidence was independently sufficient to uphold guilty verdict).

The Third Circuit took essentially the same approach in *United States* v. *Vastola*, 989 F.2d 1318 (1993), where it relied on *Griffin* and *Powell* to uphold a conviction on a substantive RICO count where the jury acquitted or

deadlocked on several substantive counts that were also charged as predicate acts, but found the defendant guilty on the substantive RICO count, and there was no special verdict stating the predicate acts upon which the jury relied. *Id.* at 1328-1331. The court explained that "[w]here there has been an inconsistent verdict, the criminal defendant is protected against jury irrationality and error by a review of the sufficiency of the evidence," and there was sufficient evidence to support the jury's verdict in that case. *Id.* at 1331. The same is true here. There is thus no plain or obvious error on this issue.

b. Petitioner is mistaken in contending (Pet. 20-23) that there is disagreement in the circuits that warrants this Court's review. The Second Circuit has, in at least two cases, employed an approach slightly different from the one employed by the court below. That approach, however, originated before this Court's decision in *Griffin*, on which the court below relied. Pet. App. 47a-48a. Because the court below distinguished the Second Circuit's approach on the basis of *Griffin*, because the Second Circuit has not evaluated the impact of *Griffin*, and because petitioner would not prevail even under the Second Circuit's approach, there is no conflict that warrants review at this time.

In *United States* v. *Delano*, 55 F.3d 720 (1995), the Second Circuit held that where the invalidated predicate acts "represent[] the bulk of th[e] RICO prosecution" —thereby "eclipsing" the remaining predicate acts—it would be inappropriate to "hazard a guess" about whether the jury would have found the defendant guilty of the RICO charge even absent those "eclipsing" predicate acts. *Id.* at 729. But *Delano* drew that approach from *United States* v. *Biaggi*, 909 F.2d 662 (2d Cir. 1990), which predated this Court's decision in *Griffin*. See

Delano, 55 F.3d at 728 (opting to "[f]ollow[] th[e] rationale" of *Biaggi*). In *Delano*, neither party cited *Griffin* in its briefing or suggested that the case might call *Biaggi* into question. Furthermore, in a RICO case preceding *Delano*, the Second Circuit indicated that, under *Griffin*, "even a *general* verdict * * * is to be upheld on appeal against a claim of insufficient evidence to support one of [multiple] alternative bases for conviction whenever the evidence suffices for at least one basis." *United States* v. *Eisen*, 974 F.2d 246, 258 (1992), cert. denied, 507 U.S. 998, and 507 U.S. 1029 (1993). Because the Second Circuit's approach predated this Court's decision in *Griffin*, and because it is unclear whether it survives *Griffin*, there is no clear circuit conflict. Review of the question presented thus would be premature at this time.

This case would not be an appropriate vehicle through which to resolve any tension in the circuits in any event because petitioner would not be entitled to a new trial on Count 2 under *Delano*. As the court of appeals recognized (Pet. App. 51a), "*Delano*'s holding applies, at most, to cases in which the invalidated predicate acts dominate the RICO prosecution." Even if it were fair to characterize Predicate Acts 2 and 4 as "invalidated" rather than simply unaddressed, it would be inaccurate to say that they "dominate[d]" the prosecution, "eclipsing" Predicate Acts 1, 13, and 14. *Delano*, 55 F.3d 729. The conduct alleged in Predicate Acts 2 and 4—namely, petitioner's acceptance of unlawful payments from Coastal Gaming and Coleary Transport—spanned a period of less than two years. Dkt. 210, at 14-15 (May 8, 2003). The indictment's other counts did not charge those payments as stand-alone offenses. By contrast, the conduct alleged in Predicate 1—petitioner's accep-

tance of unlawful payments from Hvide—spanned a period of nearly five years and was charged as a standalone Taft-Hartley violation in Count 3. *Id.* at 13-14, 37. Similarly, the conduct alleged in Predicate Acts 13 and 14 "spanned six years" (Pet. App. 52a) and encompassed more than a dozen improper expense vouchers. It is not at all clear that, if presented with these same circumstances, the Second Circuit would reverse and remand for a new trial. See, *e.g.*, *United States* v. *Dhinsa*, 243 F.3d 635, 670 (2d Cir.) (affirming RICO conviction after invalidation of predicate act that, in appellate court's view, could not have been "essential" to conviction (internal quotation marks omitted)), cert. denied, 534 U.S. 897 (2001); *Biaggi*, 909 F.2d at 693 ("In some circumstances, the jury's findings of two predicate acts * * * will permit affirmance of a RICO conviction notwithstanding the invalidation of other predicate acts."). Further review of this claim is therefore unwarranted.

3. Finally, petitioner contends (Pet. 25-27) that the court of appeals should not have reviewed for harmless error the district court's refusal to instruct the jury that "[s]upervisory personnel are not employees" (Dkt. 298, at 24 (Mar. 26, 2004)) under 29 U.S.C. 186, which he characterizes as a "theory-of-defense" instruction. Further review on that issue is not warranted.

a. In *Neder* v. *United States*, 527 U.S. 1 (1999), this Court held that "an instruction that omits an element of the offense" altogether "does not *necessarily* render a criminal trial fundamentally unfair," and that such an instructional error is therefore amenable to harmless-error analysis. *Id.* at 9; see *Mitchell* v. *Esparza*, 540 U.S. 12, 16 (2003) (per curiam). The court of appeals correctly applied *Neder* to petitioner's request for a jury instruction further defining the term "employees" in 29

U.S.C. 186 and found the alleged error to be harmless beyond a reasonable doubt.

Petitioner contended that the district court should have added a sentence to the instruction defining the elements of a 29 U.S.C. 186 offense to say: "Supervisory personnel are not employees for purposes of the Taft-Hartley Act." Dkt. 298, at 24 (Mar. 26, 2004). The court of appeals characterized the requested instruction as one that defines "an element of the offense," *Neder*, 527 U.S. at 9, explaining that petitioner "did not propose a proper theory-of-defense instruction" about supervisory personnel "but instead proposed an addition to the [district] court's instruction on the elements that would have excluded supervisors from the definition of 'employees.'" Pet. App. 61a n.29. Thus, in the court of appeals' view, the district court's refusal to instruct that "[s]upervisory personnel are not employees" was "more akin to a failure by the district court to instruct on one element of an offense than a failure to explain a specific defense theory." *Ibid.*

Having framed the issue in this way, the court assumed *arguendo* that the district court had erred, Pet. App. 62a, then reviewed the alleged error for harmlessness under *Neder* and found beyond a reasonable doubt that petitioner could not have suffered prejudice, *id.* at 63a-64a. The court correctly found that any error would be harmless beyond a reasonable doubt, because even if supervisors were not "employees" under 29 U.S.C. 186, "the evidence adduced at trial covered a significantly broader range of employees than merely supervisors" and "established that D1-MEBA and NFOPAPE actively organized to increase their job base and ensure their survival," leaving "no reasonable doubt that the

jury would have reached the same conclusion." *Id.* at 63a-64a.[6]

b. Petitioner does not dispute the court of appeals' conclusion that he did not actually submit a theory-of-defense instruction. Nor does he dispute the corollary conclusion that any error was the equivalent of failing to instruct on an element of the Taft-Hartley offense. And he does not take issue with the court of appeals' conclusion that, assuming *Neder* applies, any error was harmless beyond a reasonable doubt. Instead, he contends (Pet. 26-27) that review is warranted because "the governing law is that a district court's refusal to instruct the jury on defendant's theory of defense is reversible error if the instruction is correct and supported by the evidence."

Petitioner is wrong to suggest (Pet. 27) that the decision below conflicts with decisions from several other circuits (and from the Eleventh Circuit itself), because the court below did not hold that a refusal to give a correct and adequately supported *theory-of-defense* instruction was not reversible error. Rather, it held that a refusal to instruct on an *element of an offense* does not automatically constitute reversible error, and that legal rule is entirely in line with *Neder*. Pet. App. 62a-63a. Moreover, none of the cases petitioner cites (Pet. 26-27) squarely addressed the applicability *vel non* of the

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[6] In disputing the court of appeals' finding of no prejudice, petitioner asserts that "the government *never* argued to the Eleventh Circuit that the [presumed] error was harmless." Pet. 26 n.14. He is mistaken. See, *e.g.*, Gov't C.A. Br. 20 ("If the court's instruction was erroneous, it was harmless."); *id.* at 41 (arguing that, even if the court's instruction were erroneous, petitioner "nonetheless is not entitled to reversal * * * because D1-MEBA and/or NFOPAPE represented both supervisory and non-supervisory personnel").

harmless-error doctrine, whether to omission of an element or to a refusal to instruct on a defense theory, and none of the cases held, contrary to the decision below and to *Neder*, that an error "akin to" omission of an element is reversible error per se.[7] Further, to the extent petitioner seeks review to harmonize two decisions of the Eleventh Circuit, that is a task for the court of appeals, not for this Court. *E.g., Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

In any event, this case would be an inappropriate vehicle through which to resolve any disagreement, not only because the court of appeals concluded that petitioner did not even propose a theory-of-defense instruction, but also because the court merely *presumed* an error where no such error may have occurred. Cf. *United States* v. *Resendiz-Ponce*, 127 S. Ct. 782, 785 (2007) (noting that the Court had "granted the * * * petition for certiorari to answer the question whether the omission of an element of a criminal offense from a federal indictment can constitute harmless error," but resolving the case without reaching that question because the indictment at issue was not defective).

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[7] Indeed, the Seventh and Ninth Circuit decisions that petitioner cites predated *Neder*. See *United States* v. *Hach*, 162 F.3d 937, 946 (7th Cir. 1998), cert. denied, 526 U.S. 1103 (1999); *United States* v. *Faust*, 850 F.2d 575, 583 (9th Cir. 1988). The Seventh Circuit has long reviewed for harmless error the refusal to instruct on a defense theory. See, *e.g.*, *United States* v. *Napue*, 401 F.2d 107, 112 (1968), cert. denied, 393 U.S. 1024 (1969). Although the Ninth Circuit has held that an erroneous refusal to instruct on a defense theory is reversible error, see, *e.g.*, *United States* v. *Escobar de Bright*, 742 F.2d 1196, 1201-1202 (1984), it has not yet had occasion to "revisit[]" that holding "in light of *Neder*," *United States* v. *Kayser*, 488 F.3d 1070, 1077 n.7 (2007).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

ALICE S. FISHER
Assistant Attorney General

STEPHAN E. OESTREICHER, JR.
Attorney

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